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JARED BLUMENFELD
SECRETARY FOR
ENVIRONMENTAL PROTECTION

San Francisco Bay Regional Water Quality Control Board

March 22, 2019
CW-845973

3000 Broadway SPE, LLC
Paul Gryfakis
(via email only to pgryfakis@lowe-re.com)
1901 Harrison Street, No. 1430
Oakland, CA 94612

Subject: **Conditional Offer to Settle Violations of NPDES Permit CAG912002
3000 Broadway SPE, LLC, Oakland, Alameda County**

Dear Mr. Gryfakis:

This letter notifies 3000 Broadway SPE, LLC (Discharger) of alleged violations of discharge limitations and provides the Discharger an opportunity to settle the violations through payment of **\$3,000**, the mandatory minimum penalty pursuant to Water Code section 13385. Please reply by **April 22, 2019**.

NOTICE OF VIOLATION

The Assistant Executive Officer alleges that the Discharger has violated the NPDES permit indicated above as identified in Exhibit A, which is attached to this letter and incorporated by reference. The Discharger has the opportunity to address the alleged violations as discussed below.

STATUTORY LIABILITY

Water Code section 13385, subdivisions (h) and (i), requires the assessment of a \$3,000 mandatory minimum penalty for specified serious and chronic effluent limitation violations. Failure to file a discharge monitoring report required pursuant to Water Code section 13383 constitutes a serious violation for each complete period of 30 days following the deadline for submitting the report. The Discharger may also be subject to discretionary administrative civil liabilities of up to \$10,000 per day for each violation, plus \$10 for each gallon discharged but not cleaned up in excess of 1,000 gallons. The Regional Water Board or the State Water Board (collectively the Water Boards) may assess these mandatory minimum penalties and discretionary administrative civil liabilities beginning with the date on which each violation first occurred.¹ To assess such liabilities, the Water Boards could initiate a formal enforcement action by issuing an

¹ The statute of limitations does not apply to administrative proceedings to assess mandatory minimum penalties. See *City of Oakland v. Public Employees' Retirement System*, (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 430. Also, the equitable doctrine of laches does not apply to mandatory minimum penalties. See State Water Board Order Nos. 2013-0053, 2013-0054, 2013-0055, and 2013-0099.

administrative civil liability complaint to be followed by a public hearing. Alternatively, the Water Boards could refer the matter to the Attorney General's Office for prosecution in the Superior Court. The Superior Court may assess up to \$25,000 per day for each violation, plus \$25 per gallon discharged but not cleaned up in excess of 1,000 gallons.

CONDITIONAL OFFER TO SETTLE

The Discharger can avoid a formal enforcement action and settle the alleged violations identified in Exhibit A by accepting this conditional offer as described below and in the enclosed "Acceptance of Conditional Resolution and Waiver of Right to Hearing" (Acceptance and Waiver). This offer does not address liability for any violation not specifically identified in Exhibit A.

OPTIONS FOR RESPONSE

To accept this offer, the Discharger must complete, sign, and return the enclosed Acceptance and Waiver on or before the date specified in the first paragraph of this letter.

If the Discharger chooses to contest any of the violations alleged in Exhibit A, the Discharger should identify the specific violation and the basis for the challenge (factual error, affirmative defense, etc.) on or before the date specified in the first paragraph of this letter. Regional Water Board staff will evaluate any contested violation and take one of two actions:

1. Determine that the alleged violation warrants dismissal, dismiss the alleged violation within the California Integrated Water Quality System (CIWQS) database, notify the Discharger of the dismissal, and take no further action against the Discharger for the alleged violation; or
2. Determine that the alleged violation is meritorious and notify the Discharger of that determination. The Discharger will then have 30 days from the date of the determination to accept the mandatory minimum penalty as settlement for that violation. If the Discharger chooses not to accept the settlement or does not reply to the determination, it should expect to be contacted regarding formal enforcement for the contested violation. With respect to formal enforcement, information Water Board staff receive during any formal investigation and assessment of the violation, as well as staff costs associated with pursuing enforcement and other considerations, may increase the liability beyond that set forth in this conditional offer.

CONDITIONS FOR REGIONAL WATER BOARD ACCEPTANCE OF RESOLUTION

Federal regulations require the Regional Water Board to publish and allow the public at least 30 days to comment on any settlement of an enforcement action addressing an NPDES permit violation (40 C.F.R. § 123.27(d)(2)(iii)). Upon receipt of the Discharger's Acceptance and Waiver, Regional Water Board staff will publish a notice of the proposed settlement. If staff receives no comment within the 30-day period and no new material facts are available to the Regional Water Board, the settlement will be presented to the Executive Officer who will determine whether to execute the Acceptance and Waiver as a stipulated order assessing the uncontested mandatory minimum penalty pursuant to Water Code section 13385.

If, however, significant comments are received in opposition to the proposed settlement, this offer may be withdrawn. In that circumstance, the Water Boards will also treat the Acceptance and

Waiver as withdrawn. Water Board staff will advise the Discharger of any withdrawal and may issue an administrative civil liability complaint and schedule a hearing before the Regional Water Board or State Water Board. For such a hearing, the Discharger will be free to argue against the alleged violations. Water Board staff will treat the Discharger's Acceptance and Waiver as if it were a settlement communication and will not use it as evidence in the hearing. Water Board staff will provide the Discharger with additional information on hearing procedures if a hearing is to occur.

If the Executive Officer executes the Acceptance and Waiver, payment of the settlement amount shall be due within 30 calendar days from the date of the Executive Officer's signature. In accordance with Water Code section 13385(n)(1), funds collected pursuant to Water Code section 13385 shall be deposited into the State Water Pollution Cleanup and Abatement Account. Failure to pay the penalty within the required time may subject the Discharger to additional liability.

OPPORTUNITY FOR SUPPLEMENTAL ENVIRONMENTAL PROJECT

In lieu of paying all of the mandatory minimum penalty to the State Water Pollution Cleanup and Abatement Account, the Discharger may elect to apply a portion of the penalty to fund a supplemental environmental project (SEP).^{2,3} One SEP option is available: the SEP Fund to supplement the Regional Monitoring Program (RMP). This SEP Fund will supplement RMP studies that would not otherwise be conducted through the RMP's annually approved cost allocations. The RMP collects data and communicates information about water quality in the San Francisco Estuary in support of management decisions to restore and protect beneficial uses of the region's waters. Information about the RMP is available at <http://www.sfei.org/rmp>. The non-profit San Francisco Estuary Institute manages and administers RMP funds. No funds will go to the Water Boards.

The Discharger also may choose to pay the total mandatory minimum penalty to the State Water Pollution Cleanup and Abatement Account. These options are represented in the enclosed Acceptance and Waiver.

² Water Code section 13385(l)(1) authorizes the Regional Water Board, with the Discharger's concurrence, to direct a portion of the penalty to be expended on a SEP in accordance with the State Water Board's Enforcement Policy (https://www.waterboards.ca.gov/water_issues/programs/enforcement/water_quality_enforcement.shtml). If the penalty is less than or equal to \$15,000, 100 percent of the penalty may be expended on a SEP. If the penalty exceeds \$15,000, then up to \$15,000 plus 50 percent of the penalty that exceeds \$15,000 may be expended on a SEP.

³ See State Water Board *Policy on Supplemental Environmental Projects* (2017), page 10 (https://www.waterboards.ca.gov/water_issues/programs/enforcement/sep.html), and Resolution 2018-0034 (https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2018/rs2018_0015.pdf).

Conditional Settlement Offer
3000 Broadway SPE, LLC

REGIONAL WATER BOARD CONTACT

Please reply to the attention of Debbie Phan, either by email or U.S. mail. If you want to discuss or have questions regarding this matter, please contact Debbie Phan at (510) 622-2116 or R2NPDES.MMPS@Waterboards.ca.gov.

Sincerely,

Lisa Horowitz McCann
Assistant Executive Officer

Enclosures: Exhibit A-Notice of Violation
Acceptance and Waiver

EXHIBIT A
Notice of Violation

Discharger: 3000 Broadway SPE, LLC
 3000 Broadway, Oakland, Alameda County
 NPDES Permit CAG912002

The following table lists the alleged violations for which the Discharger is subject to civil liabilities pursuant to Water Code section 13385. The table lists the mandatory minimum penalty (MMP) that applies.

CIWQS Violation ID No.	Violation Date	Parameter (Unit)	Group	Effluent Limitation	Reported Value	Percent Exceedance ¹	Violation Type	MMP ²
1055214	7/1/2018	pH, Instantaneous Maximum (s.u.)	N/A ³	8.5	8.58	N/A	C1	
1056925	7/4/2018	pH, Instantaneous Maximum (s.u.)	N/A ³	8.5	8.81	N/A	C2	
1055226	7/4/2018	TPH as gasoline, Maximum Daily (µg/L)	2	50	100	100	C3, S	\$3,000
Total								\$3,000

Legend:

CIWQS = California Integrated Water Quality System database that the Water Boards use to track violations and enforcement.

Violation ID = Identification number assigned to each permit violation within CIWQS.

C = Count – Number of violations within past 180 days, including this violation. A penalty applies under Water Code section 13385(i) when the count is greater than three (> C3).

S = Serious. A penalty applies under Water Code section 13385(h) whenever an effluent limitation is exceeded by 40 percent or more for a Group 1 pollutant or 20 percent or more for a Group 2 pollutant.

Notes:

1. Percent that a discharger's reported value exceeds the effluent limitation for a Group 2 pollutant.
2. The MMP required under Water Code section 13385(h).
3. pH is not categorized as a Group 1 or Group 2 pollutant.

CIWQS Place ID: 845973
 WDID: 2_01NPG420519

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ORDER NO. R2-20 _____
ACCEPTANCE OF CONDITIONAL RESOLUTION
AND WAIVER OF RIGHT TO HEARING

3000 Broadway SPE, LLC
3000 Broadway, Oakland, Alameda County
NPDES Permit CAG912002, Regulatory Measure 428781

By signing below and returning this Acceptance of Conditional Resolution and Waiver of Right to Hearing (Acceptance and Waiver) to the San Francisco Bay Regional Water Quality Control Board (Regional Water Board), 3000 Broadway SPE, LLC (Discharger) hereby accepts the conditional offer to settle alleged violations through payment of a mandatory minimum penalty and waives the right to a hearing before the Regional Water Board to dispute the alleged violations. The violations are attached to this Acceptance and Waiver as Exhibit A and incorporated by reference.

The Discharger agrees that Exhibit A shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the Regional Water Board to assert jurisdiction over the alleged violations. The Discharger agrees to pay the penalty authorized by Water Code section 13385, which shall be deemed payment in full of any civil liability pursuant to Water Code section 13385 that otherwise might be assessed for the violations described in Exhibit A. The Discharger understands that this Acceptance and Waiver waives its right under Water Code section 13323 to contest the allegations in Exhibit A and the amount of civil liability assessed for the violations.

The Discharger understands that this Acceptance and Waiver does not address or resolve liability for any violation not specifically identified in Exhibit A.

This Acceptance and Waiver may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document. This Acceptance and Waiver may be executed by wet or electronic signature, and may be transmitted by hand, mail service, facsimile, or email. Any such signature shall be deemed to be an original signature and shall be binding to the same extent as if it were an original signature.

Upon execution, the Discharger shall return the Acceptance and Waiver to the following:

California Regional Water Quality Control Board, San Francisco Bay Region
NPDES Wastewater Enforcement Section
Attention: Debbie Phan
1515 Clay Street, Suite 1400
Oakland, California 94612

or

R2NPDES.MMPS@Waterboards.ca.gov

The Discharger understands that federal regulations set forth in Code of Federal Regulations, title 40, section 123.27(d)(2)(iii), require the Regional Water Board to publish notice of, and provide at least 30 days for, public comment on any proposed resolution of an enforcement action. Accordingly, prior to execution by the Regional Water Board's Executive Officer, this Acceptance and Waiver will be published for public comment as required by law.

The Discharger understands that the Executive Officer may execute the Acceptance and Waiver if no comments are received within the public notice period and the Executive Officer agrees that the assessment of the mandatory minimum penalty appropriately resolves the alleged violations. The Regional Water Board's resolution of the violations will preclude State Water Resources Control Board (State Water Board) action for the same violations.

The Discharger understands that the offer may be withdrawn if significant comments are received in opposition to the conditional offer. In that circumstance, Regional Water Board staff will advise the Discharger of the withdrawal and may issue an administrative civil liability complaint and schedule the matter for a hearing before the Regional Water Board or State Water Board.

The Discharger understands that funds collected for violations pursuant to Water Code section 13385 shall be deposited in the State Water Pollution Cleanup and Abatement Account.

The Discharger understands that, in lieu of full payment of the assessed mandatory minimum penalty to the State Water Pollution Cleanup and Abatement Account, it may elect to pay a portion toward a supplemental environment project (SEP). The SEP option is the SEP Fund, which supplements Regional Monitoring Program (RMP) studies that would not otherwise be conducted through the RMP's annually approved RMP cost allocations.

The Discharger agrees to pay the amounts indicated below to the State Water Pollution Cleanup and Abatement Account and, if chosen, the SEP Fund. The Discharger understands that the Regional Water Board will consider the Discharger to have fulfilled any SEP obligation if and when the San Francisco Estuary Institute receives the Discharger's contribution to the SEP Fund. (Place a "✓" or "✗" in one box below and fill in the blanks as appropriate. Electing to pay a portion of the assessed liability to the SEP Fund will not change the total amount to be paid.)

- Pay a portion of the assessed liability to the RMP SEP Fund:
\$ _____ Amount to be paid to the SEP Fund (cannot exceed \$3,000)
\$ _____ Amount to be paid to the State Water Pollution Cleanup and Abatement Account (\$3,000 minus amount inserted above)
\$ 3,000 Total assessed mandatory minimum penalty (sum of amounts above).

Or

- Pay the total assessed mandatory minimum liability (\$3,000) to the State Water Pollution Cleanup and Abatement Account.


The Discharger understands that once the Regional Water Board's Executive Officer executes this Acceptance and Waiver, payment no later than 30 days after the date of the Executive Officer's signature is a condition of this Acceptance and Waiver. The Discharger shall pay the assessed civil liability to the State Water Pollution Cleanup and Abatement Account and/or San Francisco Estuary Institute (for the SEP Fund) as selected above. The State Water Board will send

Acceptance of Conditional Resolution and Waiver of Right to Hearing
3000 Broadway SPE, LLC
Regulatory Measure: 428781

an invoice for any payment due to the State Water Pollution Cleanup and Abatement Account. The Regional Water Board will send an invoice for any payment due to the SEP Fund.

I hereby affirm that I am duly authorized to act on behalf of, and to bind, the Discharger in the making and giving of this Acceptance and Waiver.

3000 Broadway SPE, LLC

By: <u>Paul Gryfakis</u>	<u>Vice President</u>
Printed or typed name	Title
 <u></u>	<u>3/26/19</u>
Signature	Date

Note: Please return the signed Acceptance and Waiver with Exhibit A, together.

IT IS SO ORDERED PURSUANT TO WATER CODE SECTION 13323 AND GOVERNMENT CODE SECTION 11415.60.

By: _____	_____
Michael Montgomery Executive Officer California Regional Water Quality Control Board San Francisco Bay Region	Date